United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2581

United States Court of Appeals

FOR THE SECOND CIRCUIT

SAUL STEIN, ET ALS

v.

J. FREDERICK BITZER, CHAIRMAN, ET ALS

AN APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

TABLE OF CITATIONS

United States Court of Appeals

FOR THE SECOND CIRCUIT

SAUL STEIN, WILLIAM SLOCUM, THOMAS H. ELLIOT, DONALD MATHEWS, and MORTIMER COVERT,

Plaintiffs,

DONALD MATHEWS, MORTIMER COVERT,

Plaintiff-Appellants,

v.

J. FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut.

Defendant-Appellees.

BRIEF OF DEFENDANTS-APPELLEES

STATEMENT OF THE CASE

This is an appeal from those portions of a memorandum and order by the Honorable T. Emmet Clarie of the United States District Court for the District of Connecticut dated September 16, 1974, denying retroactive payments and attorneys' fees to the plaintiffs found to have been subjected to discriminatory practices by the State of Connecticut.

The suit was brought as a class action on behalf of all present or past "male" state employees, who were members of the State Employees' Retirement System, alleging that the state pension plan discriminated against males on the basis of sex in that females were allowed to retire with full pensions earlier than similarly situated males, in violation of the

Fourteenth Amendment and the Civil Rights Act of 1871. After a three-judge court was convened to rule on the injunctive relief sought, the complaint was amended to allege that the Retirement Act violated Title VII of the Civil Rights Act of 1964, as amended in March, 1972, to include states and, therefore, the court remanded the case to the single district judge who convened it to consider the applicability of federal statutory law.

Judge T. Emmet Clarie found that the Retirement Act constituted an unlawful employment practice by Connecticut and he granted plaintiffs prospective injunctive relief, ordering the defendant state officials to administer a retirement program without unreasonable sex classifications. However, Judge Clarie refused to grant the plaintiffs monetary damages in the form of recalculated benefits for retired males, and attorneys' fees totalling $6,275.00, on the ground that the Eleventh Amendment bars monetary and attorneys' fees awards against the state, since any recovery would come from the public treasury.

Two retired male plaintiffs have appealed to this court from Judge Clarie's denial of retrospective retirement benefits and attorneys' fees.

ARGUMENT

I.

Was It Error For The District Court Of Connecticut To Hold That The Eleventh Amendment Precludes The Award of Retroactive Money Damages To State Employees Who Successfully Established That The Connecticut Retirement Plan Violated Title VII Of The Civil Rights Act Of 1964?

A. The Eleventh Amendment, by its terms, provides that a state cannot be sued in federal court by citizens of

another state or by subjects of a foreign country. In the case of *Hans* v. *Louisiana,* 134 U.S. 1 (1890), the Supreme Court concluded that the protection of the Eleventh Amendment also extends to suits against the state by one of its own citizens. It has become well established that even though a state is not a named party to an action, the suit may nevertheless be barred by the Eleventh Amendment where the state is the real party in interest. *Ford Motor Co.* v. *Department of Treasury,* 323 U.S. 459.

The Eleventh Amendment state immunity is not absolute, however. In *Ex Parte Young,* 209 U.S. 123 (1908), the Supreme Court went on to provide that a federal court is not barred by the Eleventh Amendment from issuing prospective directions to a state official ordering him to bring his conduct in conformance with applicable federal law. The doctrine of *Ex parte Young, supra,* is a limited one, since it provides for prospective relief only, and courts have been somewhat hesitant to apply the doctrine to suits where the relief sought would involve even a prospective distribution of funds from the state treasury. *Kennecott Copper Corporation* v. *State Tax Commission,* 327 U.S. 573 (1946); *Ford Motor Company* v. *Department of Treasury,* 323 U.S. 459 (1945).

To get around the prospective relief limitation of *Ex parte Young, supra,* the appellants argue that in 1972, in amending Title VII of the 1964 Civil Rights Act, Congress clearly indicated its purpose to abrogate any assumed immunity of states to recovery of "back pay" and has, pursuant to its authority under Section V of the Fourteenth Amendment, authorized private attorneys general in place of the attorney general to obtain full relief in federal courts from discriminatory actions of states. Inherent in this argument is the notion that the states have somehow waived their Eleventh Amendment immunity by ratifying the Thirteenth, Fourteenth and Fifteenth so-called Civil Rights Amendments.

B. Even if we assume the validity of the above Constitutional assertions for a moment, it is not clear that the appellants are entitled to back pay because the rules of statutory construction as applied to the relief provision in 42 U.S.C. § 2000e-5(g) dictate that the appellants are not such employees who should be entitled to back pay. 42 U.S.C. § 2000e-5(g) provides the following relief:

> "[I]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . ."

Clearly, the term "back pay" is associated with the reinstatement or hiring of employees. In the present case the applicants are not employees who have been fired or who have not been hired because of an unfair employment practice. The harm which they have sustained from the Connecticut Retirement laws is deminimis when compared to the harm sustained by a person who is fired or is refused employment by an unfair employment practice, and the court, in its discretion, should rule accordingly. In *Peters* v. *Missouri Pacific Railroad Company*, 483 F.2d 490 (C.A. Tex. 1973), the court found that retirement plans establishing different ages for the retirement of employees violated 42 U.S.C. § 2000e-5(g) and awarded "back pay" to the plaintiffs. However, the case can be clearly distinguished from the present appeal. Besides the fact that back pay was assessed against a private employer, the retirement plan in the Peters case was racially

tinted since it mandated compulsory retirement for Black employees at 65, as compared to 70 for White employees. Since the appellants are not such employees who are intended to be protected by the specific back pay wording of 42 U.S.C. § 2000e-5(g), the type of relief to which they are entitled depends on the equitable relef which the federal court deems appropriate. If this involves granting retrospective monetary relief to an individual, a conflict arises with the Eleventh Amendment's explicit command that federal jurisdiction cannot be construed to extend to suits against states brought by private individuals.

C. Although Congress has the power under the Fourteenth Amendment to reach state discriminatory employment practices, the means to prevent such discrimination are limited by other provisions of the Constitution. The Eleventh Amendment is such a provision. It has not been repealed, and it does provide state immunity to private suits in federal courts, except for the granting of injunctive relief against state agencies.

The private cause of action embodied in Title VII of the Civil Rights Act of 1964, as amended, may be an effective enforcement tool against private employers but cannot be used against the states when monetary relief is sought. A private cause of action against a state in a federal court can only succeed if the state consents to be sued. Since the state is now basing its defense on the Eleventh Amendment Immunity, the appellants somehow contend that there has been an implied waiver. However, as stated in *Edelman* v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 1361 (1974):

> "In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable con-

struction.' *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171, (1909)."

D. The argument is made that when the states ratified the Fourteenth Amendment, they granted Congress the power to enforce the Amendment against them and that they have, therefore, consented to the suits by private parties which Congress has authorized in Title VII actions of the Civil Rights Act of 1964. The above conclusion is certainly self-serving but not well founded, since it is not clear from legislative history whether the Fourteenth Amendment effect on the Eleventh Amendment was specifically considered by Congress. Besides, in enforcing the Fourteenth Amendment against the states, the courts have not found a waiver of immunity. Instead, suits to restrain state action in violation of the Fourteenth Amendment have been permitted to be brought against state officials as nominal defendants, and prospective injunctive relief has been allowed since *Ex parte Young*, 209 U.S. 123 (1908).

E. The appellants also argue that even if public funds would be used to pay the monetary relief sought, Connecticut has consented to such suit by its statutory plans to combat discrimination. There is no doubt that Connecticut has a determined policy to end all forms of discrimination. However, it is quite a leap to conclude that the state has waived its sovereign immunity under the Eleventh Amendment by enacting strong anti-discrimination statutes. The more logical inference is that Connecticut should be allowed to settle its discrimination problems in its own courts, rather than to allow a federal court to interfere with the financial matters of the state, the very concern which led to the adoption of the Eleventh Amendment.

Since courts cannot impute to a legislature an interest to pass an unconstitutional statute a law should be construed if it can be reasonably done so as to make it valid. *Carilli* v.

Pension Commission of City of Hartford, 154 Conn. 1, 220 A.2d 439 (1966). Thus, in construing 42 U.S.C. § 2000e-5(g), it is reasonable and mandatory to exclude governmental units from the monetary aspects of the broad relief Congress has enacted, so that the Eleventh Amendment Constitutional shield is not frustrated by the statutory provision.

F. If the court holds that the Eleventh Amendment to the United States Constitution does not preclude the award of monetary damages to the plaintiffs, the recalculation of benefits should be limited to March 24, 1972, the date of the amendments to Title VII, making this state an employer. It was not until April 5, 1972 when the Equal Employment Opportunities Commission revised its "Guidelines on Discrimination Because of Sex," that it became clear that retirement benefits and plans were intended to be reached as "conditions of employment" by 42 U.S.C. § 2000e-2(a). Prior to that time the state justified its retirement laws as inducements to women to seek state employment even though the wages were less than those paid on the private sector. It also justified its position based upon the holding of the Second Circuit in *Gruenwald* v. *Gardner,* 390 F.2d 591, 592 (2d Cir. 1968, cert. den. subn. nom., *Gruenwald* v. *Cohen,* 393 U.S. 982 (1968), in which the court approved as constitutional, a disparity in the computation of federal social security retirement benefits, *Gruenwald* v. *Gardner,* 390 F.2d 591, 592 (2d Cir. 1968), cert. where men and women had equal earnings, but based its finding upon the recognized differences in attributes of men and women. Although the District Court found this practice to be discriminatory, the practice is certainly not the invidious type of discrimination which led to the adoption of Title VII of the Civil Rights Act of 1964. In limiting back pay liability in job discrimination cases to not more than two years prior to the charges filed with the Commission, it is also clear that Congress felt some limitation was appropriate to avoid windfall damage awards and to avoid harsh and sometimes unbear-

able burdens upon employers. *Labbey* v. *Northwest Airlines, Inc.*, 374 F.Supp. 1382 (D.C. 1974). Since the back pay allowed is limited to two years in discriminatory practices which are of a more invidious nature than the discrimination inherent in the Connecticut retirement plan, proper equitable relief does not warrant retroactive payments to the appellants. The failure of the appellants to bring action sooner should estop them from now imposing a heavy burden on the state, which had no intention of engaging in an unlawful employment practice.

II.

Does The Eleventh Amendment Also Prohibit The Award of Attorneys' Fees Against The Defendant-Chairman Of The State Employees' Retirement Commission If These Fees Are To Be Paid Out Of The State Treasury?

A. Although the decision of this court in *Class* v. *Norton*, 505 F.2d 123 (2d Cir. 1974) held that the Eleventh Amendment did not preclude an award of attorneys' fees, the question of an Eleventh Amendment bar to federally ordered attorneys' fee payments remains an open question and the District Courts of the United States conflict on the issue. See *Jordan* v. *Gilligan*, ____ U.S. ____ 43 U.S.L.W. 2058 (August 13, 1974); *Gates* v. *Collier*, 498 F.2d 298 (5th Cir. 1973); *Skehan* v. *Board of Trustees*, ____ F.2d ____ (3d Cir. 1974). The Supreme Court of the United States has granted certiorari in the Ohio case of *Jordon* v. *Gilligan, supra*, and should provide an answer to the issue. Meanwhile, we maintain that the better view is that the Eleventh Amendment does prohibit an award of attorneys' fees against a state that has not waived its immunity. *Jordon* v. *Gilligan, supra*.

We must reiterate some of the arguments made in *Class* v. *Norton, supra*. In *Edelman* v. *Jordan, supra*, p. 665, the court recognized that many forms of equitable relief do have

impacts on state treasuries, but that "such an ancillary effect on the state treasury is a permissible and often inevitable consequence of the principle announced in *Ex parte Young, supra.*" The permissible "ancillary effect" referred to in *Edelman,* was narrowly defined, however, as one in which the "fiscal impact" on the state treasury was the necessary result of compliance with decrees which by their terms were prospective in nature. The term "ancillary effect" thus should not involve the normal incidents of a lawsuit.

The appellants distinguish *Edelman* v. *Jordan, supra,* on the ground that in *Edelman,* the court found not a word of Congressional intent to abrogate the state's immunity, whereas in the present case they claim that the purpose of Congress to abrogate state immunity is clear. As we have argued earlier, the fact that Congress has broadened the meaning of "employer" to include governments does not and cannot mean that governmental units are also to be subject to the monetary relief provisions of 42 U.S.C. § 2000e-5(g) and 42 U.S.C. § 2000e-5(k) since this could violate the Eleventh Amendment.

B. If the court rules that the Eleventh Amendment does not bar attorneys' fees, the lower court's finding that the attorneys' fees requested are fair and reasonable in amount is not conclusive. Although it is within the discretion of a District Court whether to award attorneys' fees against a party in a civil rights action, a reviewing court may nonetheless review the determination as to reasonableness of the fee. *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (1974). In *Johnson, supra,* the court stressed that subsection (k), which authorizes attorneys' fees awards in an equal employment opportunity case, was not passed for the benefit of attorneys but to allow litigants to obtain worthy counsel. In prescribing guidelines for the application of the attorneys' fees provision of Title VII of the Civil Rights Act the *Johnson*

court further emphasized that the section should not be implemented in a manner as to make the private attorney general's position so lucrative as to ridicule the public attorney general. If fees are to be awarded at all, they should be reduced to be comparable to fees that would be earned by a public attorney general.

CONCLUSION

For the foregoing reasons the defendants-appellees respectfully request that the District Court orders denying monetary damages and attorneys' fees be affirmed.

Respectfully submitted,

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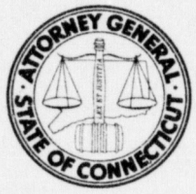

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February 18, 1975

Daniel A. Fusaro, Clerk
United States Court House
Foley Square
New York, New York 10007

Re: Saul Stein, et als
vs.
J. Frederick Bitzer, Chairman, et als
No. 74-2581

Dear Sir:

Enclosed herewith is my brief in the above-captioned matter.

I have this date transmitted two copies of the brief to all counsel of record via U. S. Mail, postage prepaid.

Very truly yours,

CARL R. AJELLO
ATTORNEY GENERAL

Sidney D. Giber

By: Sidney D. Giber
Assistant Attorney General

SDG:rm